

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

INDIANA VOICE & DATA, INC.,)	
Employer)	
)	
and)	Case No. 25-RC-182936
)	
INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS, LOCAL)	
UNION NO. 725, a/w INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS,)	
Petitioner.)	

**INDIANA VOICE & DATA'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
SUPPLEMENTAL DECISION AND DIRECTION OF RE-RUN ELECTION**

I. STATEMENT OF THE CASE

The Regional Director of Region 25 of the National Labor Relations Board ("Board") sustained three objections filed by the International Brotherhood of Electrical Workers, Local Union No. 725, a/w International Brotherhood of Electrical Workers ("Petitioner" or "Union"). With regard to two of those objections, the Regional Director rejected the recommendation of the Hearing Officer to overrule the objections. With regard to all three objections, the Regional Director either ignored undisputed and critical facts or assumed outcome-determinative facts that were not in evidence, making her conclusions clearly erroneous, directly and prejudicially affecting the rights of the Employer, Indiana Voice & Data, Inc. ("IVD" or the "Employer").

The Regional Director's only purported evidence to sustain Objection 1 (that a wage rate increase was granted during the critical period) was the alleged timing of an employee's raise. However, the Regional Director relied on a clearly erroneous interpretation of the evidence of when the Employer's President learned of Union activity to sustain the Objection. Objection 2, that the Employer's lunch break policy was changed in order to coerce employees in the exercise

of their rights, was upheld on the basis that IVD had no explanation for the policy change. This conclusion is directly contrary to the record, which established that the purpose of the change (voted on by the employees) was specifically to allow a safe space for the protection of Section 7 rights. The Regional Director upheld Objection 3 (the Employer's reiteration of its holiday pay policy) because, it was alleged, the Employer had not reiterated its holiday pay policy in the past. The Regional Director completely ignored the critical fact contained in the record that the holiday pay policy had, in fact, been reiterated to employees a few months before, prior to any organizational activity. These Objections should not have been sustained and the Employer respectfully requests that the Board accept review of these actions by the Regional Director.

II. PROCEDURAL POSTURE

The Union filed a petition for an election among IVD's Field Technicians on August 26, 2016. Pursuant to a Decision and Direction of Election issued by Region 25 of the Board, an election was conducted on October 6, 2016. The tally of ballots showed that of the eight eligible voters, four cast ballots in favor of the Union and four ballots were cast against the Union. (Brd. Ex. 1(a)).¹ There were no challenged ballots.

On October 13, 2016, the Union filed Objections to Employer Conduct Affecting the Results of the Election.² The Union asserted the following Objections:

Objection 1: The Employer gave unscheduled, discretionary pay raises to employees after it became aware of Union organizing and after the petition was filed.

¹ The following references will be used throughout this Request for Review: "Tr. pp" will refer to the transcript and page number of the Official Report of the Proceedings for the hearing conducted in this matter on October 27, 2016; "Brd. Ex." will refer to Board exhibits; "Pet. Ex." will refer to Petitioner exhibits; and "DDE pp, ¶#." will refer to the page number and paragraph number (full and partial paragraphs included) of the Regional Director's Supplemental Decision and Direction of Re-Run Election.

² Petitioner originally filed four objections, one of which was a general objection. The general objection was withdrawn prior to the objections hearing. (See Brd. Ex. 1(a)).

Objection 2: After the hearing on the petition, the Employer implemented a new policy that all employees were required to take their lunch breaks together.

Objection 3: On or about September 2, 2016, the Friday before the hearing was to be held on the petition on Tuesday, September 6, 2016 (the day after Labor Day), the Employer, aware that certain employees had been subpoenaed to the hearing, convened a meeting with the employees and "reminded" them of the Company policy that employees had to actually work the day before and after the holiday in order to receive holiday pay.

On October 27, 2016, a hearing was held concerning the Objections. On December 21, 2016, the Hearing Officer's Report on Objections and Recommendations to the Regional Director ("Report") was issued. In the Report, the Hearing Officer recommended that Objection 1 be sustained and that Objections 2 and 3 be overruled. Based on the recommended action with regard to Objection 1, the Hearing Officer also recommended that the October 6, 2016 election be set aside.

On January 3, 2017, IVD timely filed its Exceptions to the Hearing Officer's Report. IVD took exception to the Hearing Officer's Report regarding Objection 1, that the Employer gave unscheduled, discretionary pay raises to employees after it became aware of Union organizing and after the petition was filed. The Union did not file any exceptions to the Hearing Officer's recommendation that Objections 2 and 3 be overruled.

On May 4, 2017, the Regional Director of Region 25 issued a Supplemental Decision and Direction of Re-Run Election ("DDE"). The DDE affirmed the Hearing Officer's recommendation to sustain Objection 1. Contrary to the Hearing Officer's recommendation to overrule Objections 2 and 3, and despite the fact that no exceptions were filed by the Union with regard to those Objections, the Regional Director nevertheless also sustained Objections 2 and 3.

Pursuant to Sections 102.67 and 102.69 of the Board's Rules and Regulations, IVD submits this Request for Review of the DDE. The Regional Director's decision is clearly in error with regard to substantial factual issues and such errors prejudicially affected IVD's rights. In addition, there are substantial questions of law raised because the Regional Director's decision departed from the proper interpretation of Board precedent.

III. RELEVANT FACTUAL BACKGROUND

A. General Background

IVD is a telecommunications contractor specializing in the installation of low voltage cabling systems, telephone systems, and alarm systems. (Tr. 69). The President of IVD is Rudy Kaster. His wife, Nancy Kaster, is the business's Office Manager. (Tr. 90). Although the number of employees fluctuates to some degree, the Employer employed eight Field Technicians at the time of the election. (Tr. 33-34).

B. Union's Effort to Seek Voluntary Recognition

Rudy Kaster first became aware of the Union's interest in his company when he attended a meeting with the Union's Business Representative and Business Manager, Dane Strahle and Joe Kerr, respectively. (Tr. 18-19, 107). According to Mr. Strahle's testimony, the meeting took place on August 18, 2016. (Tr. 107). During the meeting, Mr. Strahle and Mr. Kerr attempted to persuade Mr. Kaster to voluntarily recognize the Union and sign the existing "telecom [collective bargaining] agreement" with the Union's Local. (Tr. 20-21; 108). Mr. Kaster said that he would consider the Union's proposal. (Tr. 108).

On August 19, 2016, the day after the meeting, Mr. Kaster advised the Union officials that rather than signing the existing telecom collective bargaining agreement, he "would like to see the new [telecom collective bargaining] agreement before he made any decision on moving

forward." (Tr. 108). This kind of meeting between Mr. Kaster and the Union officials had occurred multiple times in the past, without any Union organizational activity or election taking place. (Tr. 22).

Although Mr. Kaster was told by one of the Union officials (on either August 18 or 19, 2016) that there was card signing activity, he was not advised as to when the activity had taken place, whether it was currently underway, how many cards were allegedly signed, or by whom the cards were signed. (Tr. 27, 108). Ultimately, Mr. Kaster had no evidence of any actual Union organizing activity until the day before the petition was served (August 25, 2016). (Tr. 17-18).

C. Wage Rate Increases

IVD does not have a set starting wage rate for Field Technicians. (Tr. 17, 67). Instead, wage rates are based on market value and the new hire's "merit" upon entry into the workforce. (Tr. 17). Technicians' starting wage rates are within a fairly broad range, between \$15 and \$25 per hour. (Tr. 68). Once employed, pay increases are granted based on employee merit and the Employer's financial condition. (Tr. 27). Over the years, wage rate increases have ranged from as little as \$.25 per hour to as much as \$2 per hour. (Tr. 29). Raises have not been "across the board" and have been granted by IVD in discretionary amounts. (Tr. 30). Pay increases have occurred generally in the December/January and August time periods. (Pet. Ex. 1).

In the years prior to 2016, the wage rate increases provided to employees were consistent with the description noted above. Christopher May received a raise in December of 2014 of \$1.50 per hour. (Tr. 51). That same year, Daniel Hobby received a raise of \$1 per hour, effective August 13. (Tr. 47). Dennis Clark's wage rates fluctuated substantially through the years because he worked on prevailing wage jobs intermittently. (Tr. 74). By the end of 2014, Mr. Clark was

making \$19.26 per hour and he then received a \$1 per hour raise in January of 2015. (Tr. 60). He also received another raise of \$1.20 per hour in December of 2015. (Tr. 61).

During calendar year 2016, some, but not all, of the Field Technicians received pay increases. (Tr. 34-40). Those who received wage rate increases included Tanner Trambaugh, Thearon Miller, Dan Hobby, Dennis Clark, and Chris May. (Tr. 33). James Dennis, Christian Robertson, and Christopher Tackett³ did not receive any increase at any point during 2016. The check date and amount of increases for the five Field Technicians who received increases in 2016 are identified in the following table:

Name	Check Date-1st Raise	Amt of 1st Raise	Check Date-2nd Raise	Amt of 2nd Raise	Reference
Clark	Sept. 22	\$.53	N/A	N/A	Pet. Ex. 1; Tr. 61-62
Hobby	Aug. 18 ⁴	\$1.00	N/A	N/A	Pet. Ex. 1; Tr. 48
May	Jan. 14	\$1.30	Aug. 18	\$.40	Pet. Ex. 1; Tr. 52, 53
Miller	Mar. 24	\$1.00	Aug. 18	\$1.00	Pet. Ex. 1; Tr. 43
Trambaugh	Aug. 18	\$1.00	N/A	N/A	Pet. Ex. 1; Tr. 49

As was the case in prior years, with two exceptions, IVD's raises for Field Technicians in 2016 were granted in the December/January and August timeframes. In March of 2016, Mr. Miller received an increase of \$1 per hour. The only wage rate increase granted to any employee after the Union's petition was filed was to Mr. Clark, who received a \$.53 per hour raise in

³ Mr. Tackett worked through a temporary agency. Although he was an eligible voter, there is no evidence that he was given any wage increases during 2016. (Tr. 66, 71).

⁴ During the hearing, the parties made reference to "August 18" being the "date for the increases," although Petitioner's Exhibit 1 shows the date of "August 12." The date difference was a clerical error and should have been August 18. However, it should be noted that August 18 is not the date of the increase, but rather it is the "Check Date" for the increases, which would have been in effect for the entire previous week, beginning August 11. (Tr. 46).

September of 2016. Mr. Clark's raise was granted on September 22, 2016 because that was when he returned to work after a workers' compensation leave of absence. (Tr. 62-63).

D. Lunch Break Policy

IVD does not have an employee handbook or written policies, but it has traditionally enforced general guidelines around meal and break periods. (Tr.15, 75). Technicians receive a one-half hour unpaid lunch break, along with two fifteen-minute paid breaks during the day. (Tr. 75). Generally, employees take lunch around the noon hour. (Tr. 76). The guidelines were general in nature because lunch times could vary, depending on work schedules. (Tr. 76).

When IVD received the Union's petition, Rudy Kaster held a meeting with the Field Technicians to explain their rights. (Tr. 78-80). Mr. Kaster testified that given the nature of the business and his workforce, he wanted to be sure that every employee had the ability to exercise his protected rights. (Tr. 78). Mr. Kaster explained the employees' rights to them "to make sure that they knew what their rights were." (Tr. 80). Mr. Kaster also attempted to make sure outside Union officials could talk to employees without being challenged at the worksite (IVD is a contractor, requiring it to work on customer property). (Tr. 85). Since not many of his employees had been through this type of process previously, Mr. Kaster felt that it was important to ensure employees were informed of their rights and had access to information. (Tr. 115).

Since employee meal periods were times during the workday when Field Technicians were clearly authorized to discuss Union organizational issues, Mr. Kaster wanted to synchronize at least the meal breaks among the employees, so there would not be any question as to their rights with regard to one another or with regard to having outside visitors. (Tr. 78-80). In essence, Mr. Kaster wanted the employees to be able to get together and discuss the Union effort.

(Tr. 115-116). Mr. Kaster was actually trying to ensure Section 7 rights were being recognized and protected. (Tr. 116).

The method employed to do so was to allow the Field Technicians to vote on when the lunch period should be held. (Tr. 82). The employees expressed their views by way of a vote as to when the lunch period should be held to ensure that they knew they could discuss Union issues during their lunch periods. (Tr. 78-79). The Field Technicians determined that a uniform 11:30 a.m. lunch period would be best. (Tr. 82).

E. Holiday Pay Policy

IVD recognizes six annual paid holidays, including Labor Day. (Tr. 87). It has been a long-standing policy that IVD requires employees to work the day before and day after the holiday in order to be eligible for holiday pay. (Tr. 87-88).

On September 2, 2016, Rudy Kaster and his Office Manager (and wife), Nancy Kaster, held a meeting with the Field Technicians to discuss all company-provided benefits. (Tr. 89). The context was that Mrs. Kaster was educating employees on their benefits package. One of the items she covered was that employees are eligible for six paid holidays. To be complete, and because the Employer did not generally maintain an employee handbook, Mrs. Kaster also discussed the method of receiving pay for those holidays. (Tr. 90). Union witness James Dennis confirmed that Mrs. Kaster discussed all the employee benefits, including holiday pay and the conditions for receiving payment. (Tr. 103).

The Union suggested that the purpose in discussing holiday pay was to impliedly "threaten" employees into not showing up for a Board hearing on September 6, 2016, the next working day after Labor Day. There was no evidence, however, that the Kastors had any idea that any employee had been subpoenaed to appear at the hearing on September 6, 2016, or that

any employee was planning to attend. (Tr. 92-94). Mr. Kaster learned about the employees who planned to attend the hearing either the day before or the morning of the hearing. (Tr. 94). In addition (and contrary to the Regional Director's finding), this was not the first time employees were reminded about the holiday pay policy. Mr. Kaster also reminded Field Technicians about the holiday pay policy before the July 4, 2016 holiday. (Tr. 121).

Ultimately, when Mr. Kaster found out that employees would be participating in the Board hearing, the employees were told they would be paid holiday pay for the Labor Day holiday if they appeared at the hearing. He advised the employees that their time spent at the hearing would be treated as though it were a court hearing, that the time would be excused, and that they would continue to be eligible for holiday pay. (Tr. 123). IVD did, in fact, pay holiday pay to all the Field Technicians who appeared at the hearing. (Tr. 122).

IV. ERRORS REGARDING WAGE RATE INCREASES

The Regional Director sustained Petitioner's Objection 1, that the Employer gave unscheduled, discretionary pay raises to employees after it became aware of Union organizing and after the petition was filed.⁵ The Employer requests review of this finding because it is contrary to established Board law and it is clearly erroneous regarding the facts and evidence in the record. The Regional Director's only purported evidence to sustain Objection 1 was the alleged timing of the wage rate increases. Her interpretation of that evidence is clearly erroneous.

The Regional Director characterized the Employer's purported violation in a fashion that revealingly captures the essence underlying the errors. The Regional Director found that "[pre-petition] raises were unannounced and granted at the Employer's discretion just a few days prior

⁵ The original Objection 1 alleged that IVD gave unscheduled, discretionary pay raises to five of the Employer's eight employees. (Tr. 33). Although it is not entirely clear from the Regional Director's DDE, it appears that she sustained the Objection only with regard to one employee, Dennis Clark. (*See* DDE 2, ¶¶3, 5). However, because the Regional Director concluded that pre-petition raises were considered "context" for the post-petition raise, this Request for Review addresses all wage rate increase issues.

to the filing of the petition," which "gives context" and "adds meaning" to IVD's conduct. (DDE 2, ¶5). The Regional Director used this "context" to conclude that the pre-petition raises were also granted "at a time when the Employer was already aware of the union organizing campaign." (DDE 2, ¶5). This conclusion is simply wrong. It ignores certain undisputed evidence and misinterprets other evidence. The Regional Director then extrapolated from the inaccurate conclusion regarding the timing of Rudy Kaster's knowledge of organizational activity to find that the only raise which was actually granted during the critical period had no plausible explanation. These findings are clearly erroneous at every level of analysis.

A. The Regional Director's Reliance on Pre-petition Conduct is Misplaced

It is well-established Board law that an employer's actions taken before an election petition is filed do not warrant overturning an election, even if those actions would otherwise be objectionable, because the filing of the petition begins the "critical period." *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). In *Kokomo Tube Co.*, 280 NLRB 357, 358 (1986), the Board held that where a "wage increase was both announced and effective before the petition was filed" such an increase could not serve as the basis for setting aside an election. The Board further held in *Kokomo Tube* that the post-petition implementation of a wage increase that was both announced and effective pre-petition (even though the wage increase first showed up on paychecks issued during the critical period) does not convert a wage increase into unlawful post-petition misconduct. *Id.* at 358 fn. 8.

In this case, it is undisputed that the Union's petition, initiating the critical period, was filed on August 26, 2016. The wage increases for the IVD employees (with one exception) were implemented to be effective on paychecks issued on August 18, 2016, more than a full week prior to the petition being filed. There is no evidence of any announcement or any misconduct on

the part of the Employer during the critical period. Thus, the wage rate increases were decided upon by the Employer, implemented, and issued on initial paychecks, all prior to the petition being filed and all occurring outside the critical period.

The Regional Director used these pre-petition raises, which all occurred outside the critical period, as "context" and to "add[] meaning and dimension to the post-petition conduct." (DDE 2, ¶5). The implication is that the rationale for the pre-petition raises and the rationale for the post-petition raises must be analyzed in the same "context." The initial problem with the Regional Director's decision is that the only post-petition raise was the increase given to Dennis Clark. His wage increase (among the smallest of all the raises at \$.53/hour) was granted on September 15, 2016. The undisputed testimony, and the only evidence in the record on the issue, indicated that Mr. Clark's raise was given immediately upon Mr. Clark's return from his leave of absence for workers' compensation purposes. (Tr. 62). This undisputed explanation for the only raise occurring during the critical period was glossed over by the Regional Director, which is clearly erroneous. If the decision was made to give Mr. Clark the increase prior to the critical period (along with the other four raises), which is the "context" inferred and relied upon by the Regional Director, then the only thing that occurred during the critical period was the actual implementation of Mr. Clark's increase, which is insufficient to sustain the Objection. *Kokomo Tube Co.*, 280 NLRB 357, 358 fn. 8 (1986). It is clearly prejudicial error for the Regional Director to rely on evidence of pre-petition wage increases to attempt to ascertain an unlawful motive, but ignore the rationale provided for implementing the raise after the petition was filed.

B. The Regional Director Disregarded the Evidence Regarding the Timing of the Employer's Knowledge of the Petitioner's Organizing Activity

Even if pre-petition raises granted by the Employer were properly considered, the Regional Director's decision is still in error. The foundational error made by the Regional

Director was her finding that Rudy Kaster, IVD's President, was "aware" of the Union's organizing activity at the time the decision was made to grant wage increases (pre-petition). Indeed, it is fair to say that the purported "timing" of Mr. Kaster's knowledge in relationship to the pay increases is the only evidence relied on by the Regional Director to sustain Objection 1.

The Regional Director states, without any reference to the record, that "the Employer" met with Union officials, Messrs. Strahle and Kerr, "on August 5, 2016 and 18, 2016." (DDE 2, ¶5). Extrapolating further from these asserted meeting dates, the Regional Director concluded that Mr. Kaster must have made the decision to give raises to five of the Field Technicians after he was "already aware" of Union organizing activity. (DDE 2, ¶5). This is a clear and outcome-determinative factual error on the part of the Regional Director.

According to the Union's Business Representative, Dane Strahle, the meeting with Mr. Kaster took place on August 18, 2016, not August 5, 2016. (Tr. 107). Mr. Strahle did not even contact Mr. Kaster to attempt to arrange the meeting until August 10, 2016. (Tr. 107).⁶ Although it goes completely unexplained in the DDE, it appears that the Regional Director's reference to an "August 5, 2016" meeting is a reference to a meeting involving the Union officials and Randy Cassidy, owner of Cassidy Electric Company (a Union-represented entity). Mr. Cassidy is a part-owner of IVD. (Tr. 105-06). However, the record is absolutely devoid of any evidence whatsoever that Mr. Cassidy's meeting was communicated in any way to Mr. Kaster by anyone. The Regional Director's finding, which implies attribution of Mr. Cassidy's knowledge to Mr. Kaster, is baseless and is clearly erroneous. In fact, Rudy Kaster testified that although Mr. Cassidy was a financial partner in IVD, "I have 100 percent control of the company from an operational state." (Tr. 15). More to the point, it is undisputed that Mr. Cassidy told the Union

⁶ There is no basis for assuming that the August 10, 2016 call to set the meeting was sufficient for Mr. Kaster to be "aware" of Union organizational activity because the Union had had other such meetings with Mr. Kaster in the past, without engaging in any organizational activity. (Tr. 22).

officials to contact Mr. Kaster themselves, if they wished to discuss their plans. (Tr. 106). And Mr. Kaster testified, without contradiction, that he did not know of any claim of Union organizational activity until he attended the meeting with the Union's Business Representative and Business Manager on August 18, 2016. (Tr. 18-19, 107). There is not a single shred of evidence anywhere in the record to suggest Mr. Kaster knew anything about organizational activity because of the August 5, 2016 meeting or at any time prior to August 18, 2016.

The Regional Director's clear factual error is critical because, without a date for Mr. Kaster's knowledge of Union organizational activity prior to August 18, 2016, it is impossible to connect Mr. Kaster's decision to give raises to any alleged Union organizational activity. Mr. Strahle's testimony was clear that he did not mention to Mr. Kaster that Union authorization cards had been signed by some of the IVD employees until either August 18 or 19, 2016 (it is not clear which date—*see* Tr. 108). As noted in Petitioner's Exhibit 1, the raises granted to the Field Technicians were granted on paychecks issued on August 18, 2016, for work performed the week before. Thus, the raises were granted to those Technicians a full week before the meeting with the Union officials. The pay raises had been input the week before so checks could be issued on August 18, 2016. (Tr. 46). This is a fact which is totally ignored by the Regional Director. Indeed, it is clear that this factual error on the part of the Regional Director is the only reason she made reference to Mr. Cassidy's August 5, 2016 meeting. Without any evidence of knowledge on the part of Mr. Kaster prior to August 18, 2016, there is no evidence of any kind to support Objection 1. To conclude, as the Regional Director does, that Mr. Kaster "knew" there was organizational activity on August 5, 2016 is not just speculation, it is flatly contrary to the actual evidence in the record.

C. The Regional Director Ignored Evidence Demonstrating that the Employer's Raises Were Generally Granted in December and August

Relying on the faulty premise that the timing of the raises was suspicious, the Regional Director improperly determined that the Employer's raises were motivated to coerce or influence the Field Technicians, rather than relying on the actual evidence which showed that "the process through which the increase[s] [were] granted [was] begun before the onset of union activity."

Union Hospital of Cecil County, 229 NLRB 91 (1977).

IVD granted raises to some, but not all, of its Field Technicians on a regular schedule over the course of the past several years.⁷ Since 2014, virtually all of the raises were granted in the December/January and August timeframes. (Pet. Ex. 1). Christopher May received a raise in December of 2014 (Tr. 51) and Dennis Clark was granted a raise in January of 2015 and again in December of 2015. (Tr. 60, 61). Daniel Hobby received a raise in August of 2014. (Tr. 47).

That same pattern continued in 2016, where the majority of raises were again granted in January and August, with only two exceptions—one in March and another in September. As noted above, the September increase for Mr. Clark occurred when he returned from a leave of absence. Thus, the "process through which the increase[s]" were granted to all five Field Technicians had clearly "begun before the onset of Union activity." *Union Hospital of Cecil County*, 229 NLRB 91 (1977). The raises were, in fact, directly in line with the general pattern over the years, a process that long pre-dated any Union activity. If the Regional Director's assessment of the evidence were accepted, then it could just as easily be concluded that IVD also gave raises in 2014 and 2015 to dissuade organizational activity, which is nonsensical.

⁷ The argument that the raises were part of an unlawful scheme is further undermined by the fact that IVD did not grant raises to all of the voting-eligible employees in 2016. Five employees received raises, but three did not. If the Employer were attempting to influence employees in the free exercise of their rights or their support for the Union by way of granting raises, it makes little sense for IVD to limit its attempted influence to only a portion of the workforce. In addition, the undisputed fact is that Mr. Kaster did not discuss the wage increases with the employees who received them. This also undercuts any claim that Mr. Kaster was attempting to imply some form of quid pro quo. These facts are wholly ignored by the Regional Director.

Just as important as the relative pattern regarding the timing of raises is the undisputed fact that the basis for the Employer's raises was company profit and employee performance. *See Automated Products*, 242 NLRB 424 (1979). The record is completely devoid of any evidence of any other cause or purpose for the wage rate increases granted in 2016. This is further supported with regard to Dennis Clark's increase because the evidence is undisputed that it was granted to him upon his return from workers' compensation leave and not for any other reason. Every contrary conclusion is nothing more than speculation, which is clear error.

V. ERRORS REGARDING THE LUNCH BREAK POLICY

The Union alleged that after the petition was filed, the Employer implemented a "new" policy that all employees were required to take their lunch breaks together. By implication, the Union argued that any clarification of a work policy or rule is objectionable conduct on the part of IVD. Despite the Hearing Officer's rejection of this argument, the Regional Director sustained Objection 2 because "changes to work rules during the critical period raises an inference of coercion...." (DDE 3, ¶6). The Regional Director went on to find that IVD "failed to demonstrate a legitimate business reason for the timing of the change to the lunch break policy during the critical period." (DDE 4, ¶1). The Regional Director's interpretation of the facts and law is clearly erroneous.

The context and purpose of the Employer's action are critically significant. In this case, the evidence ignored by the Regional Director establishes that the purpose of Mr. Kaster's discussion about setting a more standard lunch break was to create a safe space for Union organizational activity. (Tr. 78-80). Repeatedly, Mr. Kaster described his rationale as an effort to ensure access to discussion and information, not to limit rights or discipline violators. (Tr. 78-80). The Regional Director ignored this evidence despite the fact that there was absolutely no

evidence of any kind presented by the Union that the setting of a common lunch time (by vote of the employees) was for any other purpose, such as discipline, surveillance, or discouraging the exercise of rights under the Act.⁸ Indeed, the Union presented no evidence that any Field Technician was disciplined or that any Field Technician felt in any way restricted in the exercise of his rights as a result of the lunch break policy discussion. Moreover, every Field Technician voted in the election (eight votes were tallied and there were eight eligible Field Technicians) and there was no evidence presented that any voter was negatively influenced by the lunch break policy. There was simply no evidence of coercion.

At worst, Mr. Kaster's actions were a good faith attempt to clarify a workplace policy in order to ensure employees could exercise their rights. *See Standard Motor Prods.*, 265 NLRB 482 (1982)(not unlawful for employer to clarify solicitation rule); *see also, Delta Brands, Inc.*, 344 NLRB 252 (2005)(Board refused to overturn election where the Union failed to prove employer enforced a workplace rule during the critical period before election or that employees were actually influenced in voting or deterred by the rule). Mr. Kaster's actions in attempting to explain to employees how he was attempting to protect their exercise of Section 7 rights, which is undisputed, cannot be reasonably construed as an effort to get the Field Technicians to refrain from engaging in permissible Section 7 activity. The Regional Director's findings regarding Objection 2 are clearly in error factually and legally.

VI. ERRORS REGARDING THE HOLIDAY PAY POLICY

The Union's final Objection sought to characterize the Employer's holiday pay policy as a threat to withdraw a benefit, as a means to influence the exercise of Section 7 rights.

⁸ The Regional Director stated that the context of the meeting was "read[ing] an unspecified NLRB document to employees...." (DDE 3, ¶6)(emphasis added). This is an additional error on the part of the Regional Director. The evidence at the hearing was that Mr. Kaster read the "entirety of the election petition, and...went through the rights of what the employees – no, what the Union party could do and what Rudy [Kaster] could do, and if those, you mentioned that if either one of those parties violated any right, to contact the correct officials." (Tr. 114-115).

Specifically, the Union claimed that on September 2, 2016, the Friday before the original hearing was to be held on the petition on Tuesday, September 6, 2016 (the day after Labor Day), the Employer, being allegedly aware that "certain employees" had been subpoenaed to the hearing, convened a meeting with the employees and "reminded" them of the policy that employees had to actually work the day before and the day after the holiday in order to receive holiday pay. Although the Hearing Officer recommended overruling this Objection, the Regional Director, once again, found IVD's alleged actions to be coercive.

While it is true that the discontinuance of, or threat to discontinue, a benefit, such as holiday pay, during an organizational campaign can invalidate an election, that is simply not what happened in this case, as the facts clearly show. *Lake Mary Health & Rehab.*, 345 NLRB 544 (2005)(elimination of shift bonus invalidated election); *Climatrol, Inc.*, 329 NLRB 946 (1999)(elimination of holiday pay invalidates election). As is the case in the evaluation of any such situation, the alleged "threat" to withdraw a benefit must be evaluated in its "total context." *TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981). Contrary to the Regional Director's finding that Rudy Kaster "announced" a holiday pay policy on September 2, 2016 (DDE 4, ¶5), it is undisputed that it had been IVD's long-standing policy that employees must work the day before and day after the holiday in order to be eligible for holiday pay. (Tr. 87-88). This very common employer condition of receiving holiday pay was not, however, the context in which the holiday policy was discussed with the Field Technicians. On September 2, 2016, Rudy and Nancy Kaster met with the Field Technicians to discuss all company-provided benefits. (Tr. 89). The meeting was not directed at "reminding" employees about the conditions under which holiday pay was available, but rather, as the Union's own witness James Dennis confirmed, the Kastars discussed all the employee benefits as part of the Union campaign. (Tr. 103). It was not used as some kind

of opportunity to try to threaten employees, and there was no such evidence. The Regional Director completely ignored this context in sustaining the Objection, which is clearly erroneous.

It is undisputed that Mr. Kaster had no idea that any employee had been subpoenaed to appear at the hearing or that any employee was planning to attend of his own volition. (Tr. 92-94). Mr. Kaster learned about the employees who planned to attend the hearing either the day before or the morning of the hearing. (Tr. 94). The Regional Director, however, found that since Mr. Kaster knew the hearing would take place on September 6, 2016 when he spoke to employees on September 2, 2016, and because he allegedly had not reminded employees about the holiday pay policy before other holidays, the discussion of holiday pay on September 2, 2016 was coercive. (DDE 5, ¶1).

The linchpin of the Regional Director's ruling, that Mr. Kaster had never before instructed employees about the holiday pay policy, is a critical factual error. Contrary to the Regional Director's finding, Labor Day 2016 was not the first time employees were reminded about the holiday pay policy. Mr. Kaster also reminded IVD's employees about the holiday pay policy before the July 4, 2016 holiday, when no organizational activity was allegedly occurring. (Tr. 120-21). This fact goes completely unmentioned by the Regional Director.

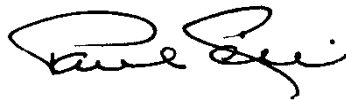
Finally, to the extent the Regional Director assumed that the Employer was using the holiday pay condition as a threat to influence employees in the exercise of their rights, that conclusion is completely gutted by the undisputed fact that when Mr. Kaster found out that Field Technicians would be attending the Board hearing, he advised them that they would be paid holiday pay for the Labor Day holiday and advised them that their time spent at the hearing the day after the holiday would be treated as though it were a court hearing (i.e., "excused time off"). (Tr. 121-122). Furthermore, it is undisputed that IVD did, in fact, pay all the Field Technicians

their Labor Day holiday pay, including those who appeared at the hearing. (Tr. 122). Thus, even if the Employer's actions could somehow be viewed as improper, it is entirely unreasonable to connect the holiday pay discussion to the employees' free choice in the election. The Regional Director's ruling on Objection 3 is clearly erroneous.

VII. CONCLUSION

For the foregoing reasons, the Employer, Indiana Voice & Data, Inc., by counsel, requests that the Board accept review of the Regional Director's DDE. The Regional Director ignored undisputed and critical facts or assumed outcome-determinative facts that were not in evidence, making her factual conclusions and legal interpretations clearly erroneous, directly and prejudicially affecting the rights of the Employer.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing has been electronically filed with the National Labor Relations Board and served by electronic mail and/or U.S. Mail (as indicated) this 18th day of May, 2017, on the following:

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